term "destructive device." Resolution of the question of whether the underscored language modifies only "shotgun shell" and not "shotgun" turns on application of the doctrine of the last antecedent.

The court of appeals held that "the phrase 'generally recognized as particularly suitable for sporting purposes,' modifies 'shotgun,' as well as 'shotgun shell.'" 416 F.3d at 979. the court of appeals explained that "the plain language of the statute indicates that the qualifying clause modifies both 'shotgun' and 'shotgun shell'" and that:

> following the last antecedent argument would create an "absurd result." (citing *Demko* v. *United States*, 216 F.3d 1049, 1053 (Fed.Cir.2000)). Under Thomasian's argument, "§ 5845(f)(2) would have the incongruous effect that no shotgun could be a 'destructive device,' but all shotgun shells (except those generally recognized as particularly suitable for sporting purposes) would be 'destructive devices.' " *Id.*

416 F.3d at 979.

In determining the intent of Congress, courts must "employ[] traditional tools of statutory construction . . . ." *Chevron, U.S.A.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, n.9 (1984). The doctrine of the last antecedent is a venerable tool of statutory construction used to determine whether a modifying word, phrase, or clause applies to the last one of, or to all of, a series of preceding nouns (or phrases), the last of which is separated from the other

antecedent noun or nouns (or phrases) by the disjunctive "or."[2]

In *F. T. C. v. Mandel Brothers*, 359 U.S. 385 (1959), this Court construed the term "invoice" as defined in § 2 (f) of the Fur Products Labeling Act, 65 Stat. 175, 15 U.S.C. § 69:

> a written account, memorandum, list, or catalog, which is issued in connection with any commercial dealing in fur products or furs, and describes the particulars of any fur products or furs, transported or delivered to a *purchaser*, consignee, factor, bailee, correspondent, or agent, or *any other person* who is engaged in dealing commercially in fur products or furs.

359 U.S. at 386 (emphasis added).

In particular, the Court had to determine whether the underscored phrase modified only "any other person" or whether it also modified also all the other preceding terms in the subsection including "purchaser." The court of appeals had held that "engaged in dealing commercially" modified not only "any other person" but also all the other preceding terms in the

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[2] See *District 6, United Mine Workers of America* v. *United States Department of the Interior*, 562 F.2d 1260, 1264, n.17 (D.C. Cir. 1977), where the court quoted the doctrine of the last antecedent as stated by *Sutherland Statutory Construction*:

> Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent, which consists of "the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence."

subsection including "purchaser." 359 U.S. at 389. This Court rejected that holding, stating that "this limiting clause is to be applied only to the last antecedent." *Id.*

More recently, this Court addressed whether the words "tending to cause confusion" in the phrase "the words 'Olympic', 'Olympiad', 'Citius Altius Fortius', or any combination or simulation thereof *tending to cause confusion*" modified the word "Olympic." (emphasis added). *San Francisco Arts & Athletics v. U.S. Olympic Committee*, 483 U.S. 522 (1987). This Court concluded that, "because there is no comma after 'thereof,' the more natural reading of the section is that 'tending to cause confusion' modifies only 'any combination or simulation thereof.'" 483 U.S. 528-529. Plainly, had there been a comma after "thereof," the Court would have concluded that the phrase "tending to cause confusion" modified not only the phrase "any combination or simulation thereof," but the earlier word "Olympic."

In § 5845(f)(2), the absence of a comma after "shotgun shell" makes clear that the modifying phrase applies only to "shotgun shell" and that the court of appeals' conclusion conflicts with this Court's view of the doctrine of the last antecedent.

In *Anhydrides & Chemicals, Inc.* v. *United States*, 130 F.3d 1481 (Fed. Cir. 1997), the court followed this Court's view of the doctrine of the last antecedent, considering the doctrine to be one of the "rules of grammar [which] apply in statutory construction" and applied the doctrine to interpret the phrase: "anhydrides, halides, peroxides, peroxyacids and other derivatives . . . of succinic acid *derived in whole or in part from*

*maleic anhydride or from cyclohexane . . . .*" (emphasis added). The court concluded that, "[s]ince 'succinic acid' is the last antecedent to 'derived in whole or in part from maleic anhydride or cyclohexane,' . . . the clause is properly read as modifying 'succinic acid.'" 130 F.3d at 1483.

The Third Circuit has consistently applied the doctrine of the last antecedent. In *United States ex rel. Santarelli* v. *Hughes*, 116 F.2d 613, 616 (3rd Cir. 1940), the Third Circuit noted that the doctrine of the last antecedent is "common sense in grammar hardened into law."

In *National Surety Corp.* v. *Midland Bank*, 551 F.2d 21 (3rd Cir. 1977), the court applied the doctrine of the last antecedent to interpret the phrase: "letters of credit authorizing holders thereof to draw drafts upon it . . . at sight or on time *not exceeding one year*." (emphasis added). In particular, the court had to determine whether the italicized phrase modified the first underscored phrase as well as "time" or modified only "time". The court concluded:

> Common English usage, let alone the last antecedent rule of statutory construction, requires that the italicized language be read to modify "time", rather than the more remote phrase "letters of credit".

551 F.2d at 34.

In the case at bar, the words immediately preceding the qualifying phrase are "shotgun shell." Thus, just as the modifying phrase in *National Surety Corp.* modified only

"time," not also "letters of credit" (the words proceeding the disjunctive "or"), so the modifying phrase in the case at bar modifies only "shotgun shell," not "shotgun" (the word proceeding the disjunctive "or").

In *Elliot Coal Mining Co.* v. *Director, Office of Workers Compensation Programs*, 17 F.3d 616 (3d Cir. 1994), the court construed the following:

> "operator" means any *owner, lessee,* or *other person* who operates, controls, or supervises a coal or other mine . . . .

17 F.3d at 629.

The issue was whether the phrase "who operates, controls, or supervises a coal or other mine" modified "owner" and "lessee" as well as "other person . . . ." The Director argued that the doctrine of the last antecedent applied and that the modifying phrase modified only "other person" -- the last noun in a series of three nouns ("owner, lessee, or other person"). In rejecting the Director's understanding of the doctrine of the last antecedent, the court observed that there was:

> a comma before the conjunction "or." Under the normal rules of English punctuation for words in a series, it is the absence of a comma or other punctuation before the coordinate conjunction "or" that would indicate it and its modifier, the limiting adjective clause, are to be treated separately rather than as part of the whole series.

17 F.3d at 630 (emphasis added).

Thus, the court concluded, "the limiting clause applies to the entire series." *Id.* Moreover, the court, relying on *National Surety Corp.* v. *Midland Bank, supra*, approved the general rule that "lack of a comma limited application of the qualifying language to the word immediately preceding it . . . ." *Id.*

In contrast to the punctuation in the language at issue in *Elliot Coal Mining Co.*, in the language at issue here, there is no comma before the conjunction "or". If Congress had sought to modify "shotgun" as well as "shotgun shell," Congress would have used a comma after "shotgun" and before "shotgun shell" to indicate that the modifying phrase modified both "shotgun" and "shotgun shell." That Congress did not do so indicates that Congress intended the modifying phrase modifies only "shotgun shell." Thus, for the very reason that the Director's argument was rejected in *Elliot Coal Mining Co.*, the modifying language in the case at bar does not modify the word "shotgun," but only the words "shotgun shell."

The Fourth Circuit has adopted the Third Circuit's approach:

> Absent an expression of contrary congressional intent, the failure to apply this canon "flies in the face of common sense in grammar hardened into law." *United States ex rel. Santarelli* v. *Hughes*, 116 F.2d 613 (3rd Cir. 1940).

*National Coalition for Students* v. *Allen*, 152 F.3d 283, 288, n.6

(4th Cir. 1998).

The court of appeals here adopted the approach of the court in *Demko* v. *United States*, 216 F.3d 1049 (Fed. Cir. 2000), in which the court held that it did not need to "reach the issue of the doctrine of the last antecedent because the statute is unambiguous." 216 F.3d at 1053. This statement implies that the doctrine of the last antecedent is only applied if a statute is ambiguous. On the contrary, as a traditional rule of statutory construction, the doctrine of the last antecedent is applied to determine *whether* a statute is ambiguous. As expressed in *NLRB* v. *United Food & Com'l Wkrs Union*, 484 U.S. 112, 123 (1987), "On a pure question of statutory construction, our first job is to try to determine congressional intent, using 'traditional tools of statutory construction.'"

The very approach taken in *Demko* (and here) was rejected by the Third Circuit in *National Surety Corp.* v. *Midland Bank*, *supra*. There, the district court had found the statute at issue "'not clear on its face'" (551 F.2d at 27) and declined to apply the doctrine of the last antecedent. Instead, to resolve the statute's ambiguity, the district court reviewed the purposes of the statute. The Third Circuit reversed the district court, applying the doctrine of the last antecedent to determine the "plain meaning of the statute." 551 F.2d at 34. The Third Circuit concluded that application of the doctrine of the last antecedent "requires rejection of the district court's finding of ambiguity." Id. Thus, *Demko* should have applied the doctrine of the last antecedent at the outset to determine the plain meaning of § 5845(f)(2).

To support what it viewed as the plain meaning of §

5845(f)(2), *Demko* noted that its reading "is consistent with Congress's goal in enacting the legislation requiring the tax on firearms . . . ." 216 F.3d at 1053. But reading a statute so as to achieve what the court views as the statute's goal is not permissible if the statutory text is to the contrary. In *Rodriguez* v. *United States*, 480 U.S. 522 (1987), this Court rebuked the court of appeals for its reliance on:

> its understanding of the broad purposes of the [statute] . . . . Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.

480 U.S. at 525-26.

*Demko* and the court of appeals here did the same; it read § 5845(f)(2) so as to carry out what they perceived was the statute's primary objective instead of construing the statute using traditional rules of construction.

Further evidencing *Demko*'s effort to read § 5845(f)(2) so as to carry out what it perceived was the statute's primary objective is its statement that, if the modifying phrase does not modify both "shotgun" and "shotgun shell", the statute "would have the incongruous effect that no shotgun could be a 'destructive device,' but all shotgun shells . . . would be . . . ." *Id.* The court of appeals here accepted this specious analysis. The *Demko* court, however, offered no explanation why this result would be "incongruous" or why, even if it is

"incongruous," that should be a basis for not implementing Congress' will.[3] Indeed, as the legislative history below demonstrates, the fact that no shotgun could be a "destructive device" is precisely what Congress intended.[4] As *Rodriguez, supra*, makes clear, Congress may make choices which may not appear logical, but courts are to implement those choices, not frustrate them.

*Demko* further concluded that:

> the doctrine [of the last antecedent] would not control in this case because it would create an absurd result. *See generally Squillacote* v. *United States*, 747 F.2d 432, 433-34 (7th Cir. 1984) (suggesting that the doctrine of the last antecedent is inapplicable when it creates absurd or otherwise conflicting results).

216 F.3d at 1053.

While *Squillacote* rejected application of the doctrine of the last antecedent in light of the peculiar result of its application to the statute at issue, that result is very much

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[3] *Demko* also suggested that "common sense" would dictate that Congress intended that shotguns, as well as shotgun shells, were "destructive devices." *Id.* The court offered no explanation why that would be so.

[4] It is also untrue that all shotgun shells would be "destructive device" since the modifying phrase ("which the Secretary or his delegate finds is generally recognized as particularly suitable for sporting purposes") permits the Secretary or his delegate to exempt any shotgun shell.

different than the result of applying the doctrine to § 5845(f)(2). In *Squillacote*, application of the doctrine of the last antecedent would have required a dispute over a regulation to go to one court and a dispute over the statute on which the regulation was based to go to a different court. 747 F.2d at 432. Thus, the peculiar nature of the result was apparent from the face of the statute. By contrast, *Demko* offered nothing to explain why application of the doctrine of the last antecedent would "create an absurd result."[5] This assertion is mere *ipse dixit*.

In fact, what is absurd is to believe that, after extensive debates on legislation that could have brought all shotguns within the ambit of the term "destructive device," but did not, as shown, *infra*, Congress intended, in what was merely "a technical revision of existing law" (S. Rep. 1501, 90th Cong., 2d Sess. 30 (1968)), to delegate expansive, unfettered authority to determine which shotguns *were* within the ambit of the term "destructive device."

This Court's observation in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) with regard to the regulation of tobacco, a political issue at least as contentious as firearms regulation, is equally applicable here: "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."

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[5] The result would certainly not be absurd in the sense meant by this Court when it refers to an absurd result. In *Sorrells* v. *United States*, 287 U.S. 435 (1932), the Court held that, despite the literal language of a statute, certain persons were not encompassed within it. The explained: "General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence." 287 U.S. at 446.

2) The legislative history of § 5845(f)(2) supports the view that the modifying phrase does not modify "shotgun" and demonstrates conclusively that it is the conclusion of the court of appeals which may be characterized as absurd.

§ 5845(f)(2) is part of what was originally enacted as the National Firearms Act of 1934 ("NFA"). The original NFA did not include any reference to "destructive device."

In March, 1965, the Johnson Administration proposed legislation to amend the NFA and the Federal Firearms Act of 1938 (FFA). Proposed Amendments to the National Firearms Act and the Federal Firearms Act: Hearings Before the Committee on Ways and Means, House of Representatives, 89th Cong., 1st Sess. 3 (1965). For the first time, a definition of "destructive device" was proposed; it was to be added to § 5848, the definitions section of the NFA.[6] S. 1591, 89th Cong. 2d Sess. (1965). In pertinent part, that definition would have stated that the term "destructive device" included:

> any type of weapon by whatsoever name known (other than a shotgun having a barrel or barrels of 18 or more inches in length), which will, or which is designed to, or which may be readily converted to, expel a projectile, or projectiles by the action of an explosive, the barrel or barrels of which have a bore of one-half inch or more in diameter . . . .

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[6] The definitions section of the NFA is now § 5845.

The Johnson Administration also proposed legislation to amend the FFA, which also would have added a definition of "destructive device." That bill was introduced as S. 1592, 89th Cong. 2d Sess. (1965). In pertinent part, that definition stated that the term "destructive device" included:

> any type of weapon by whatsoever name known which will, or is designed to, or which may be readily converted to expel a projectile or projectiles by the action of an explosive, the barrel or barrels of which have a bore of one-half inch or more in diameter.

Sec. 1(a). Reprinted in S. Rep. 1866, 89th Cong., 2d Sess. 43.

Unlike the bill amending the NFA, which exempted certain shotguns in the definition itself, S. 1592 limited the coverage of the definition by creating a Section 1(b)(2) which stated in pertinent part: "The term "destructive device" shall not include . . . (C) any shotgun (other than a short-barreled shotgun) . . . ." *Id.* at 44.[7] The Johnson Administration's legislation was not enacted by the 89th Congress.

In the 90th Congress, Senator Hruska introduced S. 1853 to amend the FFA and S. 1854 to amend the NFA.[8] The definition of "destructive device" in S. 1854 was as follows:

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[7] According to the Report, the exemption was removed from the definition so that it became an affirmative defense and not an element of the offense which the government had to prove. *Id.* at 76.

[8] Senator Hruska stated that S. 1854 "is similar in approach to S. 1591," the bill introduced for the Johnson Administration in the 89th Congress. 114 Cong. Rec. 13705.

> any type of weapon by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive, the barrel or barrels of which have a bore of more than .78 inches in diameter . . . .

S. 1854 also stated: "The term 'destructive device' shall not include . . . (iii) any shotgun . . . ." 114 Cong. Rec. 13705 (1967).

When S. 917 (an omnibus crime control bill) was marked-up by the Senate Judiciary Committee, the Committee included a definition of "destructive device" in the definitions section of Chapter 44 of title 18 (§ 921)[9], which read:

> The term "destructive device" means . . . any type of weapon which will, or is designed to or may be readily converted to, expel a projectile by the action of any explosive, and having any barrel with a bore one-half inch or more in diameter.

§ 921(a)(4). S. Rep. 1097, 90th Cong., 2d Sess. (1968).

§ 921 also included a subsection (b)(2) which stated in part: "The term 'destructive device' shall not include . . . (C) any shotgun other than a short-barreled shotgun . . . ." In addition, § 921(a)(16) defined "ammunition" as "ammunition for a destructive device; it shall not include shotgun shells or any

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[9] This definition was necessary since the bill as approved by the Committee established a system whereby, instead of including "destructive devices" as NFA weapons, the approval of a principal local law enforcement officer would have to be obtained before a "destructive device" could be transferred.

other ammunition designed for use in a firearm other than a destructive device." These provisions were enacted into law on June 19, 1968 as part of Title IV of the Omnibus Crime Control and Safe Streets Act of 1968. Pub. L. 90-351, 82 Stat. 197 (1968). Thus, as of June 19, 1968, shotguns (other than short-barreled shotguns) were excluded from the definition of "destructive device"; the Secretary had no authority to classify a shotgun as a "destructive device" based on its suitability for sporting purposes.

On June 10, 1968, H.R. 17735 was introduced in the House of Representatives. It was reported out of the House Judiciary Committee on June 21, 1968. Consideration of H.R. 17735 began on the House floor on July 19, 1968. While H.R. 17735 proposed amendments to numerous provisions of Chapter 44 of Title 18, no change was proposed to 18 U.S.C. § 921(a)(4)(defining "destructive device") or to § 921(b)(2)(C)(excluding shotguns (other than short-barreled shotguns) from the definition of "destructive device"); § 921(a)(16) was, however, to be amended to encompass all ammunition. 114 Cong. Rec. 22224. Although H.R. 17735 as passed by the House included no proposed changes to 18 U.S.C. § 921(a)(4) or to § 921(b)(2)(C), the House adopted an amendment to § 921(a)(16) to define "ammunition" as "only ammunition for a destructive device and pistol or revolver ammunition. It shall not include shotgun shells . . . ." 114 Cong. Rec. 23093 (1968). The House passed the bill on July 24, 1968 and sent it to the Senate.

The companion bill in the Senate, S. 3633, was introduced by Senator Dodd on June 12, 1968. 114 Cong. Rec. 16883. When the bill was marked up by the Senate Judiciary

Committee on September 6, 1968,[10] the Committee proposed "technical changes" to § 921(a)(4), which included adding "[e]xceptions to the definition [of destructive device]" to § 921(a)(4) itself and repealing the exceptions in § 921(b)(2)(C). S. Rep. 1501, 90th Cong., 2d Sess. 20, 54, 56 (1968).[11] The definition of "ammunition" was to be amended to state that ammunition "shall only include ammunition for a destructive device and pistol or revolver ammunition. It shall not include shotgun shells . . . ."[12] As proposed to be amended by the Committee, the pertinent part of the definition of "destructive device" was to read:

> any type of weapon by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, the barrel or barrels of which have a bore of more than one-half inch in diameter, except a shotgun or shotgun shell which the Secretary or his delegate finds is generally recognized as particularly suitable for sporting purposes . . . .

S. Rep. 1501, 90th Cong., 2d Sess. 54.

The Committee Report explained that the proposed definition of "destructive device" is "a technical revision of

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[10] This was, of course, about 6 weeks after the House had passed H.R. 17735.

[11] At that time, § 921(b)(2) stated in part: "The term 'destructive device' shall not include . . . (C) any shotgun other than a short-barreled shotgun . . . ."

[12] This language is identical to the language adopted earlier by the House in H.R. 17735.

existing law . . . ." S. Rep. 1501, 90th Cong., 2d Sess. 30 (1968).[13] Similarly, during Senate floor debate on September 16, 1968, Senator Dodd, in seeking Senate approval of the Committee amendment to his bill, reiterated that the definition proposed by the Committee was "a technical revision of existing law . . . ." 114 Cong. Rec. 26900 (1968). Senator Hruska (who, the year before, had introduced S. 1854, which completely excluded shotguns from the definition of "destructive device") stated that it was a "noncontroversial measure . . . ." 114 Cong. Rec. 26900 (1968). Senator Cooper -- who voted for the amendment, along with Senators Hruska and Dodd, 114 Cong. Rec. 26900-1 -- noted later in the debate that Senators Dodd and Hruska had commented "intelligently" on the definition of "destructive device" and concluded that "destructive devices includes, as I consider, every kind of weapon which goes beyond the case of a shotgun, a sporting rifle, or a pistol or revolver." (emphasis added). 114 Cong. Rec 26903. Senator Cooper thus viewed all shotguns as not

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[13] In the explanatory part of the Report, the Report referred to a "shotgun shell or shotgun generally recognized as particularly suitable for shooting sport purposes . . . ." As the U.S. Court of Appeals for the District of Columbia Circuit has said of committee reports which differ from the language of the bill:

> [W]e think it plainly wrong as a general matter, and in this case in particular, to regard committee reports as drafted more meticulously and as reflecting the congressional will more accurately than the statutory text itself. Committee reports, we remind, do not embody the law. Congress, as Judge Scalia recently noted, votes on the statutory words, not on different expressions packaged in committee reports. *Hirschey* v. *FERC*, 777 F.2d 1, 7-8 & n. 1 (D.C. Cir. 1985) (Scalia, J., concurring).

*Abourezk* v. *Reagan*, 785 F.2d 1043, 1054-55, n. 11 (D.C. Cir. 1986).

being "destructive devices."[14] The amendment was approved by the Senate 79 to 1. *Id.*[15]

From these comments, it is evident that the Senate did not intend to do anything other than reenact, in a slightly different form, the complete exemption for shotguns from the definition of "destructive device." Indeed, had the Senate intended the bill to grant the Secretary the authority to classify shotguns as "destructive devices" and thus bring them within the controls of the NFA, the amendments certainly would not have referred to as "technical" or "noncontroversial" since such a grant of authority would have represented a radical change from existing law.

That granting the Secretary the authority to classify shotguns as "destructive devices" would have been controversial is evidenced by the controversial nature of the "sporting purposes" language itself. In considering identical "sporting purposes" language in the provision of the law prohibiting importation of firearms which did not meet the "sporting purposes" test, there was extensive debate. See 114 Cong. Rec. 27461-27465 (1968). Both Senators Hruska and Murphy -- who supported the adoption of the "destructive device" definition -- spoke out against the "sporting purposes" test. Senator Murphy, for example, expressed his concern with

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[14] Senator Dodd was the sponsor of the bill; he and Senator Hruska were the sponsors of the Senate Judiciary Committee amendment. "It is the sponsors that we look to when the meaning of the statutory words is in doubt." *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951). Moreover, as sponsors whose statements were not contradicted by other senators -- indeed, Senator Cooper concurred -- reliance on their statements is thus entirely appropriate as an indicator of Congress' intent.

[15] Later that day, the Senate, without debate or recorded vote, voted to strike out § 921(b)(2). 114 Cong. Rec 26915 (1968).

the vagueness of the language by noting that "sometimes the meaning [appointive officers in the executive branch] read into a law is not exactly the meaning that Congress intended in writing the law." 114 Cong. Rec. 27465 (1968). It is inconceivable that Senator Murphy would have voted for the "destructive device" definition two days earlier if he had understood it to mean that the "sporting purposes" test to which he was opposed applied to shotguns.

The Senate passed S. 3633 on September 18, 1968, 114 Cong. 27491, and substituted, in H.R. 17735, the language of S. 3633 for the language of H.R. 17735. *Id.*

As the House rejected the Senate amendments to H.R. 17735, a conference committee was appointed to resolve the differences. With regard to "destructive devices," the conference committee "adopted the Senate amendment." 114 Cong. Rec. 30576 (1968). Both the Senate and the House then passed the conference committee's proposed bill on October 9 and 10 respectively.[16] The President signed it into law on October 22, 1968. Pub. L. 90-618, 82 Stat. 1213 (1968).

In sum, the legislative history makes plain that Congress did not intend that the definition of "destructive device" encompass any shotgun. As this result is consistent with proper application of the doctrine of the last antecedent, the conclusion is unmistakable that the modifying language does not modify "shotgun" and that no shotgun is a "destructive device."

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[16] Because the conference committee adopted the Senate amendment, the legislative history of the amendment is its Senate history.

## II.
## THE COURT OF APPEALS' DECISION THAT THE PHRASE "GENERALLY RECOGNIZED AS" IN § 5845(f)(2) IS NOT AN UNCONSTITUTIONAL DELEGATION CONFLICTS WITH THIS COURT'S DECISIONS

In *Touby* v. *United States*, 500 U.S. 160 (1991), this Court reiterated its long-standing construction of Art. I, § 1 of the Constitution: "Congress may not constitutionally delegate its legislative power to another Branch of government." *Id.* at 165. That, however, is what Congress has done here, if, despite application of the doctrine of the last antecedent and despite the legislative history, the modifying language in § 5845(f)(2) modifies "shotgun."

In *Touby*, the Court repeated its prior decisions holding that "Congress [must] 'lay down . . . an intelligible principle to which the person or body authorized to [act] is directed to conform . . . .' (citation omitted)." *Id.* at 165. § 5845(f)(2) does not contain such a principle.

The key language in § 5845(f)(2) is "generally recognized as particularly suitable for sporting purposes." The phrase "particularly suitable for sporting purposes," standing alone, lays down an intelligible principle since the Secretary's determination would be made only by reference to the quantifiable characteristics of the instrument itself. But, by preceding the phrase with the language "generally recognized as," the entire phrase loses it intelligibility by making the Secretary's determination dependent not upon an analysis of the quantifiable characteristics of the instrument itself, but rather upon whether some unspecified group recognizes the instrument as "particularly suitable for sporting purposes." Indeed, in clear recognition of the lack of an intelligible

principle in the phrase "generally recognized as," the agency itself, in ATF Ruling 94-2, did not even discuss, let alone conclude, that the Striker 12 is not "generally recognized as" particularly suitable for sporting purposes.

The phrase "generally recognized as particularly suitable for sporting purposes" also does not "meaningfully constrain[]" ATF's discretion to define criminal conduct.

In *Touby*, the Court upheld the statute at issue since it "meaningfully constrains the Attorney General's discretion to define criminal conduct." 500 U.S. at 166. The Court found such restraint embodied in the following requirements: that the Attorney General make a finding that scheduling a drug temporarily is "necessary to avoid an imminent hazard to the public safety"; that this finding be based upon three specific factors; that the Attorney General publish 30 day of the proposed scheduling in the Federal Register, transmit notice to the Secretary of HHS, and "take into consideration any comments submitted by the Secretary in response"; and that the Attorney General make findings regarding the use of the drug. 500 U.S. at 166.

None of these restraints are present in § 5845(f)(2). Indeed, since a classification pursuant to § 5845(f)(2) is a permanent classification, not a temporary classification similar to the one upheld in *Touby*, the absence in § 5845(f)(2) of the additional restraints which apply to the permanent scheduling of drugs -- discussed at 500 U.S. at 168 -- only exacerbates the unconstitutional nature of the delegation of legislative power by § 5845(f)(2).[17]

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[17] Subsequent to *Touby*, the Court upheld § 109(b)(1) of the Clean Air Act against a delegation challenge because:

The rule laid down in *Touby* follows from earlier cases which also demonstrate that the delegation in § 5845(f)(2) is precisely the type of delegation of which the Court would not approve: *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943); *Yakus* v. *United States*, 321 U.S. 414 (1944); and *Lichter* v. *United States*, 334 U.S. 742 (1948).

In *National Broadcasting Co.*, the Court upheld the delegation to the Federal Communications Commission of the power to regulate radio stations "as public interest, convenience or necessity requires . . . ." In doing so, the Court relied on Section 1 of the Communications Act, which stated the general purpose of the Act:

> to make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . .

319 U.S. at 214.

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the text of § 109(b)(1) of the CAA at a minimum requires that "[f]or a discrete set of pollutants and based on published air quality criteria that reflect the latest scientific knowledge, [the] EPA must establish uniform national standards at a level that is requisite to protect public health from the adverse effects of the pollutant in the ambient air." Tr. of Oral Arg. in No. 99-1257, p. 5. Requisite, in turn, "mean[s] sufficient, but not more than necessary." *Id.*, at 7.

*Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 473 (2001).

No similar limitations are found in the NFA.

Further, the Court noted, Section 301 "particularizes this general purpose with respect to radio . . . ." 319 U.S. at 214. Finally, the Court observed that "[t]he 'public interest' to be served under the Communications Act is thus the interest of the listening public in 'the larger and more effective use of radio'. § 303(g)." 319 U.S. at 216. Taken together, these statutory provisions satisfied the Court that adequate standards were established by Congress and that the Act was not an unconstitutional delegation.

By contrast, in the National Firearms Act (NFA), 26 U.S.C. Chapter 53, the Act of which § 5845(f) is a part, Congress did not enact any general or specific purpose. There is thus no standard to guide the Secretary or his delegate in applying the phrase "generally recognized as." Because that phrase is "so vague and indefinite . . . the delegation of legislative authority is unconstitutional." 319 U.S. at 225-6.

The Court's decision in *Yakus*, where the Court upheld the power of the Price Administrator, delegated by § 2(a) of the Emergency Price Control Act (EPCA), points in the same direction:

> after consultation with representative members of the industry so far as practicable, to promulgate regulations fixing prices of commodities which "in his judgment will be generally fair and equitable and will effectuate the purposes of this Act" when, in his judgment, their prices "have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act."

321 U.S. at 420.

In promulgating the regulations referred to, the Court noted, § 2 of the EPCA

> required the Administrator to "ascertain and give due consideration to the prices prevailing between [certain specific dates] . . . and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including . . . [list of factors]."

321 U.S. at 421.

The Court thus concluded that "[t]he standards set out in § 2 define the boundaries within which prices having that purpose must be fixed." 321 U.S. at 423. Moreover, because § 2 required that the regulation be "accompanied by a 'statement of the considerations involved' in prescribing it," 321 U.S. at 422, "the courts in an appropriate proceeding can see that substantial basis for those findings is not wanting." 321 U.S. at 423.

Comparison of the NFA to the EPCA highlights the shortcomings of the NFA and confirms the conclusion that the "generally recognized as" language of § 5845(f) is an unconstitutional delegation.

First, unlike the EPCA, the NFA does not require the promulgation of a regulation. Considering that Secretary or his delegate must determine what is "generally recognized as" suitable for sporting purposes, this failure to seek public input is especially egregious.[18]

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[18] In this vein, the NFA also does not require "consultation with representative members of the industry . . . ."

Second, the NFA does not require the Secretary or his delegate to refer to any objective data, as was the case with the EPCA (which required reference to prices on certain specific dates). Rather, the NFA requires the Secretary or his delegate to determine the views of some unspecified segment of the general public, without indicating how such determination is to be made or whose views are to be considered.

Third, there is no requirement in the NFA that the Secretary or his delegate state the basis for his conclusion that a particular shotgun is viewed by the unspecified segment of the general public as a sporting shotgun. Thus, a court cannot determine if there is a "substantial basis," *Yakus* at 423, for the conclusion.[19] In short, the reasoning of *Yakus* compels the conclusion that the "generally recognized as" language in § 5845(f)(2) is an unconstitutional delegation.

Finally, *Lichter* also buttresses the argument that the "generally recognized as" language in § 5845(f)(2) is an unconstitutional delegation.

In upholding the delegation to the executive branch of the power to determine whether "excessive profits" had been made on government contracts, the Court strongly emphasized that the Renegotiation Act was enacted pursuant to Congress' war power, "under which the exercise of broad discretion as to methods to be employed may be essential to [its] effective use . . . ." 334 U.S. at 779. The NFA, however, was enacted under the taxing power. *Sonzinsky* v. *United States*, 300 U.S. 506, 513 (1937). Congress thus lacked the "broad discretion" that

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[19] In ATF Rul. 94-2, there was not even an attempt to provide an explanation for the conclusion that the Striker 12 was not "generally recognized as" a sporting firearm.

it had when enacting the Renegotiation Act.[20]

Second, the initial Renegotiation Act had been enacted "in light of," 334 U.S. at 783, administrative practices interpreting the term "excessive profits" and the Second Renegotiation Act included a definition of "excessive profits" which set out six factors to be taken into consideration. 334 U.S. at 799-800. No such claim can be made for § 5845(f)(2).

Third, the "purpose of the Renegotiation Act and its factual background establish a sufficient meaning for 'excessive profits' as those words are used in practice." 334 U.S. at 785. In the case of the NFA, neither its purpose nor its background establish any meaning for the phrase "generally recognized as".[21]

In sum, like *National Broadcasting Co.* and *Yakus*, *Lichter* demonstrates that the phrase "generally recognized as" is an unconstitutional delegation.

There is an additional reason the phrase "generally recognized as" is an unconstitutional delegation. In *A.L.A. Schecter Poultry Corp. et al.* v. *United States*, 295 U.S. 495 (1937), the Court invalidated the National Industrial Recovery Act. One of the grounds for the Court's decision was the Act's delegation of "legislative authority to trade or industrial associations or groups . . . ." 295 U.S. at 537. Such a delegation to private parties "is unknown to our law, and is

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[20] "[I]t is the established rule not . . . to enlarge [tax statutes'] operations so as to embrace matters not specifically pointed out." *Gould* v. *Gould*, 245 U.S. 151, 153 (1917).

[21] The Court also observed that the concept of excess profits was not novel and had been the subject of earlier statutes and cases. 334 U.S. at 784.

utterly inconsistent with the constitutional prerogatives and duties of Congress." 295 U.S. at 537.

A similar delegation exists with the phrase "generally recognized as" since a determination of whether a firearm is lawful is dependent upon the views of some portion of the general public. Indeed, the delegation made by § 5845(f)(2) is more egregious than that invalidated by *Schecter Poultry* since the phrase "generally recognized as" does not even specify whose views are to be considered. The phrase "generally recognized as" is thus "utterly inconsistent with the constitutional prerogatives and duties of Congress," 295 U.S. at 537, and should, if construed to modify "shotgun," be invalidated, thereby rendering unconstitutional the classification of the Striker 12 as a "destructive device."

## CONCLUSION

This Court should grant this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

RICHARD E. GARDINER*
Suite 404
10560 Main Street
Fairfax, Virginia 22030
(703) 352-7276

*Counsel for Petitioner*
*Counsel of Record

October, 2005

# APPENDIX

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

| | | |
|---|---|---|
| United States of America, | ) | |
| | ) | |
| Plaintiff-Appellee, | ) | |
| | ) | |
| Craig A. Thomasian, | ) | |
| | ) | |
| Claimant-Appellant, | ) | |
| | ) | |
| v. | ) | No. 04-35360 |
| | ) | D.C. No. |
| One Sentinel Arms Striker-12 | ) | CV-03-00886 |
| Shotgun Serial No. 001725, In Rem, | ) | |
| | ) | |
| Defendant. | ) | |

Appeal from the United States District Court
for the District of Oregon
Malcolm F. Marsh, District Judge, Presiding

Submitted July 11, 2005.[1]
Portland, Oregon

Filed July 26, 2005

Before: Pamela Ann Rymer, A. Wallace Tashima,

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[1] This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Circuit Judges, and Charles R. Weiner,[2] Senior Judge

Opinion by Judge Weiner

## COUNSEL

Richard E. Gardiner, Esquire, Fairfax, VA, for appellant Craig Thomasian.

Karin J. Immergut, United States Attorney for the District of Oregon, Leslie J. Westphal, Assistant United States Attorney for the District of Oregon, Portland, OR, for appellee United States of America.

## OPINION

WEINER, Senior District Judge:

This is a civil in rem forfeiture action in which the United States sought to forfeit defendant property, a Sentinel Arms Striker-12 shotgun, serial no. 001725 ("Striker-12 shotgun"), on the basis that the Striker-12 shotgun is a "destructive device" possessed in violation of the National Firearms Act ("NFA"). 26 U.S.C. §§ 5861(d), 5872. The claimant, Craig Thomasian, filed a claim of interest and then moved to dismiss the complaint for failure to state a claim, arguing that the Bureau of Alcohol, Tobacco and Firearms ("ATF") can not properly classify the Striker-12 shotgun as a "destructive device" pursuant to 26 U.S.C. § 5845(f)(2), and that Congress unconstitutionally delegated legislative authority

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[2] The Honorable Charles R. Weiner, Senior United States District Court Judge for the Eastern District of Pennsylvania, sitting by designation.

to ATF. The district court found that the United States had properly stated a claim for forfeiture and denied Thomasian's motion to dismiss. On May 17, 2004, the district court entered a final judgment of forfeiture against defendant. Thomasian timely appealed. We find Thomasian's arguments without merit, and affirm the decision below.

**Discussion**

Questions of statutory interpretation are reviewed de novo. *United States* v. *Cabaccang*, 332 F.3d 622, 624-25 (9th Cir.2003) (*en banc*). Challenges to the constitutionality of a statute are questions of law and are also reviewed de novo. *United States* v. *Carranza*, 289 F.3d 634, 643 (9th Cir.2002), *cert. denied*, 537 U.S. 1037, 123 S.Ct. 572, 154 L.Ed.2d 458 (2002).

[1] The National Firearms Act defines a destructive device as, "any type of weapon by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, the barrel or barrels of which have a bore of more than one-half inch in diameter, except a shotgun or shotgun shell which the Secretary finds is generally recognized as particularly suitable for sporting purposes [.]" 26 U.S.C. § 5845(f)(2) (emphasis added). Thomasian argues that according to the doctrine of the last antecedent, the clause "which the Secretary finds is generally recognized as particularly suitable for sporting purposes," modifies "shotgun shell," but not "shotgun." Thus, the statute would categorically exclude all shotguns from the definition of a destructive device.

[2] "In determining the scope of a statute, a court must look first to the statute's language and structure. If the statute's language is unambiguous, its plain language controls except in

rare and exceptional circumstances." *United States* v. *LeCoe*, 936 F.2d 398, 402-03 (9th Cir.1991) (internal citations and quotations omitted). As the Federal Circuit recently noted, § 5845(f)(2) is not ambiguous and the plain language of the statute indicates that the qualifying clause modifies both "shotgun" and "shotgun shell." *Demko* v. *United States*, 216 F.3d 1049, 1053 (Fed.Cir.2000). As the Federal Circuit also explained, following the last antecedent argument in this case would create an "absurd result." Id. at 1053. Under Thomasian's argument, " § 5845(f)(2) would have the incongruous effect that no shotgun could be a 'destructive device,' but all shotgun shells (except those generally recognized as particularly suitable for sporting purposes) would be 'destructive devices.' " Id. This would be an absurd result indeed.

[3] The plain language of the statute and the legislative history make clear that the phrase "generally recognized as particularly suitable for sporting purposes," modifies "shotgun," as well as "shotgun shell." See H.R.Rep. No. 90-1956 (1968), reprinted in 1968 U.S.C.C.A.N. 4426, 4427. Moreover, as we have specifically recognized, the doctrine of the last antecedent "must yield to the most logical meaning of a statute that emerges from its plain language and legislative history." *Northwest Forest Res. Council* v. *Glickman*, 82 F.3d 825, 833 (9th Cir.1996).

[4] Thomasian next argues that the phrase "generally recognized as suitable for sporting purposes" contained in 26 U.S.C. § 5845(f)(2) unconstitutionally delegates legislative authority to ATF. We disagree. "So long as Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Mistretta* v. *United States*, 488 U.S. 361, 372, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989). As the

Federal Circuit correctly held, the sporting purpose standard meets the "intelligible principles" test. *Demko*, 216 F.3d at 1054. The Federal Circuit is not the only court to reach this conclusion. This exact standard, contained in the Gun Control Act, was held constitutional in *Gilbert Equipment Co.*, v. *Higgins*, 709 F.Supp. 1071 (S.D.Ala.1989), aff'd. 894 F.2d 412 (11th Cir.1990). The fact that this standard is non-quantitative does not change our result, as the Supreme Court has often held that non-quantitative standards do not violate the nondelegation doctrine. See, *e.g.*, *Am. Power & Light Co.* v. *SEC*, 329 U.S. 90, 104, 67 S.Ct. 133, 91 L.Ed. 103 (1946) (upholding statute giving SEC authority to modify corporate structures so that they are not "unduly or unnecessarily complicate[d]" and do not "unfairly or inequitably distribute voting power among security holders"); see also *Yakus* v. *United States*, 321 U.S. 414, 419-20, 423-27, 64 S.Ct. 660, 88 L.Ed. 834 (1944) (upholding statute giving agency power to set prices that "will be generally fair and equitable").

Accordingly, the decision of the district court is AFFIRMED.

UNITED STATES OF AMERICA,

Plaintiff,

v.

ONE SENTINEL ARMS STRIKER-12 SHOTGUN, SERIAL NO. 001725, IN REM,

Defendant.

No. CV 03-886-MA.

April 13, 2004.

Leslie J. Westphal, OSB # 83344, Assistant United States Attorney, Portland, OR, for Plaintiff United States.

ORDER

MARSH, J.

*1 On October 21, 2003, I filed an order denying Craig Thomasian's motion to dismiss this civil forfeiture proceeding. In so ruling, I held that the subject matter of this action, a Striker-12 shotgun is a "destructive device" within the meaning of the National Firearms Act (NFA), 26 U.S.C. § 5845(f)(2) and ATF Ruling 94-2. This ruling effectively disposed of the merits of Thomasian's claim against the forfeiture.

Thereafter, the government moved to strike Thomasian's claim for failure to timely file an answer. I granted this motion by Order dated January 22, 2004. Because there were no other claims filed, I entered a Default Judgment of Forfeiture on March 13, 2004.

On March 17, 2004, Thomasian filed an opposition to the entry of a default judgment. With this opposition, Thomasian re-raised many of the arguments asserted with his motion to dismiss; he also offered to stipulate to the facts alleged in the complaint and asked that I enter a judgment on the pleadings pursuant to Fed. R Civ. P. 12(c) in lieu of a default judgment. I set aside the default judgment and asked the government to respond to Thomasian's opposition. I also noted that the government's original motion for default judgment would be placed back onto the court's calendar. The government then responded with a motion for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c). [FN1]

FN1. On April 6, 2004, Thomasian filed a notice of appeal. Pursuant to Federal Rule of Appellate Procedure 4(a)(4), I retain jurisdiction to rule on motions to alter or amend a judgment. See Leader National Ins. Co. v. Industrial Indemnity Insurance Co., 19 F.3d 444 (9th Cir.1994) (notice of appeal is held in abeyance pending resolution of motion to amend judgment).

Based upon the record, the government is entitled to judgment as a matter of law. Consistent with my opinion of October 21, 2003, I find by a preponderance of the evidence that the subject matter of this action is subject to forfeiture because it is a "destructive device" within the meaning of 26 U.S.C. § 5845(f)(2)and ATF Ruling 94-2. Further, no timely answer was filed by the only claimant to the subject matter of this action. Accordingly, the government's original motion for default judgment (# 22) is DENIED as MOOT; the government's alternative motion for judgment on the pleadings (# 27) is GRANTED.